Supreme Court, U.S.
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No. 92-416

In The

Supreme Court of the United States

October Term, 1992

JOANNE M. WESTON,

Petitioner,

vs.

FIRST INTERSTATE BANK OF CALIFORNIA;
FIRST INTERSTATE MORTGAGE COMPANY;

AND

FRANKLIN S. CIBULA, A LAW CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS RESTATED

1. Whether the Bankruptcy Court abused its discretion by issuing its Order directing counsel to prepare Findings of Fact and Conclusions of Law while Petitioner's appeal was pending.

2. Whether Petitioner's Petition Is Moot.

3. Whether the record establishes that the Honorable Barry Russell, Judge of the Bankruptcy Appellate Panel, acted improperly or whether the decisions of the courts below were improperly influenced because Petitioner is not an attorney.

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BRIEF FOR RESPONDENT IN OPPOSITION

REASONS TO DENY THE WRIT

This case does not merit review under any of the standards set forth in this Court's Rule 10.1(a). The decision of the Court of Appeals is correct because the Bankruptcy Court had jurisdiction to enter Findings of Fact and Conclusions of Law to support its conversion order. Moreover, Petitioner's Petition is Moot and presents no justiciable controversy. Finally, there is nothing in the record to suggest that the Honorable Barry Russell, Judge

of the Bankruptcy Appellate Panel for the Ninth Circuit, acted improperly or that the courts below were influenced by the fact that Petitioner is in *propria persona*.

A. A Bankruptcy Court Can Render Decisions After The Filing of An Appeal

Petitioner argued below that the Bankruptcy Court abused its discretion by converting her consolidated Chapter 11 cases to cases under Chapter 7 on August 25, 1989. Petitioner appealed the order converting her cases on September 5, 1989. Petitioner was not granted a stay pursuant to Bankruptcy Rule 8005. On September 12, 1989, the Honorable David E. Russell, Bankruptcy Judge, issued an Order directing counsel to prepare Findings of Fact and Conclusions of Law relative to the conversion order. By doing so, Judge Russell simply made a record of the basis for the order.

The Bankruptcy Appellate Panel for the Ninth Circuit affirmed the conversion order and held that, *inter alia*, the Bankruptcy Court did not abuse its discretion in issuing the order. A-33 to Petitioner's Petition. The Court of Appeals for the Ninth Circuit affirmed the BAP decision. Petitioner nevertheless asserts that the Bankruptcy Court lacked jurisdiction to issue the Order directing counsel to prepare Findings of Fact and Conclusions of Law. Petitioner argues that this Court should issue a Writ of Certiorari to review the decision of the Court of Appeals of the Ninth Circuit.

Initially, it is a well established rule that a bankruptcy court has wide latitude to reconsider and vacate its prior decisions, so long as the proceedings have not

been terminated, and intervening rights have become vested which would be disturbed by a modification or reconsideration of the court's decision. *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131 (1937). There, this Court held:

> A court of equity may grant a rehearing, and vacate, alter, or amend its decree, after an appeal has been perfected and after the time for appeal has expired . . . *Wayne United Gas Co.*, 300 U.S. at 136.

At the time Judge David Russell issued his order directing the preparation of Findings of Fact and Conclusions of Law, the proceedings had not been terminated and intervening rights had not become vested. Petitioner's Petition, A-33. Of course, the Order did not modify or alter the conversion order in any manner.

Even if a Bankruptcy Court is divested of jurisdiction, it is only divested of jurisdiction as to the same issues that are on appeal. *See In re Bialac*, 964 F.2d 625 (9th Cir. 1982). As the United States Bankruptcy Appellate Panel of the Ninth Circuit succinctly stated in its Order filed January 10, 1991:

> If Weston's interpretation of the effect that an appeal renders upon the bankruptcy court's jurisdiction were correct, she would be able to delay any progress in the case and avoid her obligations to her creditors for several years beyond the five years this case has already been pending. *Weston v. First Interstate Bank*, Bap No. EC-89-1256, EC-89-1796 & EC-89-1816 (Consolidated). A-18 to Petitioner's Petition.

Petitioner attempts to create a conflict between the BAP and the Ninth Circuit Panel rulings by citing various Ninth Circuit Court decisions which have no relevance to the issue presented to the Court. Further, Petitioner misleadingly cites case law for propositions which simply do not exist.

For example, Petitioner cites *Mullis v. U.S. Bankruptcy Court, District of Nevada*, 828 F.2d 1385, 1389, n.11 (9th Cir. 1987) for the proposition that a bankruptcy judge who continues to act in a case after an appeal has been filed is acting without jurisdiction. Footnote 11 to *Mullis*, 828 F.2d at 1389 specifically states:

> Thus, *we need not and do not decide* whether a judge who continues to act in a case after the timely filing of a notice of appeal from a final judgment is acting in the clear absence of all jurisdiction or merely in excess of his or her jurisdiction. *Mullis*, 828 F.2d at 1389. [Emphasis Added].

The Bankruptcy Court was not precluded by the filing of Petitioner's appeal from issuing its Order directing counsel to prepare Findings of Fact and Conclusions of Law. The Chapter 7 proceedings had not terminated, nor had any intervening rights materialized or become vested, at that point. Moreover, the Order complained of did not affect the issues raised by the appeal – it merely facilitated establishment of a record to enhance the reviewing Courts' comprehension of those issues.

Petitioner's reliance upon *Midwest Properties No. Two v. Big Hill Investment Co., Inc.*, 93 B.R. 357 (N.D. Tex. 1988) is also misplaced. There, the District Court held that the

Bankruptcy Court's entry of Findings of Fact and Conclusions of Law two months after entry of a sanction order was a nullity under the provisions of Federal Rule of Civil Procedure 52(b). Although the District Court therefore did not consider the Findings and Conclusions, it found ample support for the sanctions order in the record.

In her appeal to the BAP, Petitioner filed over 800 pages of excerpts detailing the proceedings in the trial court. Petitioner's Petition A-16 and 17. The BAP did not rely exclusively upon the Findings of Fact and Conclusions of Law, but also "reviewed the detailed record in [that] appeal." Petitioner's Petition A-21.

Petitioner was not prejudiced in any manner by the Bankruptcy Court's order directing preparation of Findings of Fact and Conclusions of Law to support the conversion order.

B. Petitioner's Petition Is Moot

A case is moot and not justiciable, if the passage of time has caused it completely to lose its character as a present, live controversy of the kind that must exist if the Court is to avoid advisory opinions on abstract propositions of law. *Hall v. Beals*, 396 U.S. 45, 48 (1969). As this Court stated in *Mills v. Green*, 159 U.S. 651, 653 (1895):

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in

> issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. *Mills*, 159 U.S. at 653.

Petitioner was discharged from her debts by the Bankruptcy Court on April 6, 1992. Respondent's A-1. Additionally, the Chapter 7 Trustee abandoned Petitioner's real property to her – upon her motion – in February, 1990. Respondent's A-3. Petitioner has been discharged from her debts and her property has been returned to her.

Further, after Petitioner was discharged in April, 1992, First Interstate Bank of California re-instituted non-judicial foreclosure as to Petitioner's property. In June, 1992, Petitioner filed a State Court action in Siskiyou County Superior Court, Case No. 47301, which seeks to enjoin the Bank's sale of the property. Respondent's A-5. Petitioner has elected to pursue whatever claims she may have against the Bank in an entirely different forum.

Any relief granted by this Court would be untimely and ineffectual.

C. Nothing In The Record Indicates Improper Judicial Conduct Or Influence Of the Courts Below Because Petitioner Is Not An Attorney

Petitioner asserts that the Honorable Barry Russell, Judge of the Bankruptcy Appellate Panel, acted improperly and that the decisions of the courts below were influenced by the fact that Petitioner was not an attorney. Petitioner, however, offers no factual support in the record for any of her claims of misconduct or prejudice. The plain truth is rather obvious. There was no misconduct. Petitioner has simply misused the Court system to avoid her obligations to her creditors.

CONCLUSION

The Bankruptcy Court did not abuse its discretion by issuing an Order directing counsel to prepare Findings of Fact and Conclusions of Law while Petitioner's appeal was pending. Moreover, Petitioner's Petition is moot because Petitioner has been discharged from her debts and her property has been abandoned to her. The Petitioner has chosen an entirely different forum to pursue her alleged claims against the Bank. Finally, nothing in the record indicates judicial misconduct or improper

influence. No purported issue requires an exercise of this Court's jurisdiction.

Certiorari should be denied.

DATED: September 30, 1992.

Respectfully submitted,

KEITH A. KANDARIAN

TOBIN & TOBIN

Attorneys for Respondent
First Interstate Bank of California

UNITED STATES BANKRUPTCY COURT

BL E50 P80001611

EASTERN DISTRICT OF CALIFORNIA

IN RE:	)	CASE NUMBER:
JOANNE M. WESTON	)	2-86-05445-B-07
DEBTOR(S)	)	
	)	

TO:
JOANNE M. WESTON
612 S MT. SHASTA BLVD.
MOUNT SHASTA, CA 96067-2232

****DISCHARGE OF DEBTOR(S)****

IT APPEARING THAT THE PERSON(S) NAMED ABOVE FILED A PETITION COMMENCING A CASE UNDER TITLE 11, UNITED STATES CODE, THAT AN ORDER FOR RELIEF WAS ENTERED UNDER CHAPTER 7, AND THAT NO COMPLAINT OBJECTING TO THE DISCHARGE OF THE DEBTOR(S) WAS FILED WITHIN THE TIME FIXED BY THE COURT (OR THAT A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR(S) WAS FILED AND, AFTER DUE NOTICE AND HEARING, WAS NOT SUSTAINED), IT IS ORDERED THAT:

1. THE ABOVE-NAMED DEBTOR(S) IS RELEASED FROM ALL DISCHARGEABLE DEBTS.

2. ANY JUDGMENT HERETOFORE OR HEREAFTER OBTAINED IN ANY COURT OTHER THAN THIS COURT IS NULL AND VOID AS A DETERMINATION OF THE PERSONAL LIABILITY OF THE DEBTOR(S) WITH RESPECT TO ANY OF THE FOLLOWING:

(A) DEBTS DISCHARGEABLE UNDER 11 U.S.C. SEC. 523;

(B) UNLESS HERETOFORE OR HEREAFTER DETERMINED BY ORDER OF THIS COURT TO BE NONDISCHARGEABLE, DEBTS ALLEGED TO BE EXCEPTED FROM DISCHARGE UNDER CLAUSES (2), (4), AND (6) OF 11 U.S.C. SEC 523 (A);

(C) DEBTS DETERMINED BY THIS COURT TO BE DISCHARGED UNDER 11 U.S.C. SEC. 523 (D).

3. ALL CREDITORS WHOSE DEBTS ARE DISCHARGED BY THIS ORDER AND ALL CREDITORS WHOSE JUDGMENTS ARE DECLARED NULL AND VOID BY PARAGRAPH 2 ABOVE ARE ENJOINED FROM INSTITUTING OR CONTINUING ANY ACTION OR EMPLOYING ANY PROCESS TO COLLECT SUCH DEBTS AS PERSONAL LIABILITIES OF THE ABOVE-NAMED DEBTOR(S).

DATED: APRIL 6, 1992

BY ORDER OF THE COURT

RICHARD G. HELTZEL, CLERK

JoAnne M. Weston
612 S. Mt. Shasta Blvd.
Mount Shasta, CA 96067
(916) 926-4410

Debtor in pro per

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re	)	~~Case No.~~
	)	~~285-00957-B-7~~
JOANNE M. WESTON,dba WESTON ENTERPRISES,	)	(286-05445-B-11)
	)	Motion Control No.
Debtor.	)	JMW-16
	)	[11 U.S.C. § 102(1);
	)	(NOH), Rule 3, Section
	)	A(9), Local Rules of Court,
	)	E.D. Calif.]

ORDER ~~DIRECTING~~ *ABANDONING*
~~TRUSTEE TO ABANDON ASSETS~~
ASSETS TO DEBTOR

(Filed Feb. 16, 1990)

As directed by this Court in the Order of January 18, 1990 re MCN: JMW-14, the Debtor herein, JoAnne M. Weston, served and filed the above-referenced Motion Control No. JMW-16. All parties in interest having been served with the Notice of Motion and Opportunity for Hearing, as well as the Motion itself, and no Objections nor Requests for Hearing re the Motion having been served and filed,

IT IS HEREBY ORDERED that the Trustee, William L. Conway, is to administer *only* the funds recovered from Siskiyou Title Company in this case.

IT IS FURTHER ORDERED that ~~the Trustee ABANDON~~ all other assets of the estate *are hereby abandoned* to the Debtor herein, JoAnne M. Weston The *Debtor may* file a NOTICE of said ABANDONMENT within twenty (20) days from this date, and serve same on all parties.

Dated: FEB 16 1990

/s/ David E. Russell
DAVID E. RUSSELL,
Bankruptcy Judge

This is to certify that this is a true and correct copy of the original thereof on file in the office of the Clerk, U.S. Bankruptcy Court.

RICHARD G. HELTZEL
U.S. Bankruptcy Court
By /s/ Marilyn Weaver
Deputy Clerk

Robert A. Rehberg
A Law Corporation
429 Redcliff Dr., Suite 220
P.O. Box 1045
Redding, CA 96099
(916) 223-0660

Attorney for

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SISKIYOU

JOANNE WESTON,
Plaintiff,
v.
FIRST INTERSTATE BANK OF CALIFORNIA,
Defendant.
_____/

No: 47301
COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIONS.
(Filed June 23, 1992)

Plaintiff alleges:

1. Plaintiff is and was at all times mentioned herein a resident of the County of Siskiyou and owner in fee of the real property sought to be sold by defendant by the foreclosure procedure described in this complaint.

2. Plaintiff is informed and believes and thereon alleges that First Interstate Bank of California is a corporation either formed under the laws of the State of California or authorized to do business in this state and that said corporation maintains offices within the County of Siskiyou. Plaintiff is further informed and believes and thereon alleges that defendant is the successor to United California Bank.

3. On or about November 20, 1979, plaintiff executed a note in favor of defendant's predecessors in interest, United California Bank, in the sum of $21,000.00 which note was all due and payable not later than May 19, 1980. A copy of said note is attached hereto as Exhibit "A".

4. On or about January 14, 1982, plaintiff executed a deed of trust on real property owned by her in the County of Siskiyou which deed of trust was given for the purpose of securing payment of the note attached as Exhibit "A". A copy of said deed of trust is attached hereto as Exhibit "B".

5. On or about March 25, 1988, defendant issued and served upon plaintiff it's [sic] Notice of Default and Election to Sell under the deed of trust, referring to the deed of trust attached hereto as Exhibit "B". A copy of said Notice of Default and Election to Sell is attached hereto as Exhibit "C".

6. On or about January 8, 1990, defendant again issued and served upon plaintiff it's Notice of Default and Election to Sell under said deed of trust, which notice is attached as Exhibit "D".

7. On or about May 26, 1992, defendant issued and served upon plaintiff its notice of trustees sale under deed of trust, which notice was intended to notify plaintiff that the real property referred to in the deed of trust attached as Exhibit "B" would be sold under the provisions of said deed of trust by reason of plaintiff's default on the note attached as Exhibit "A".

8. From time to time prior to May 26, 1992, defendant had advised plaintiff of its intent to take action to enforce the note attached as Exhibit "A" and after the notice attached as Exhibit "E", plaintiff advised defendant that the enforcement of the note including foreclosure under the deed of trust was barred by the statute of limitations including the statute of limitation set forth in Civil Code Section 882.020 through 882.040, which sections refer to ancient mortgages and deeds of trust. Notwithstanding plaintiff's said advice to defendant, defendant has persisted in the issuance of it's notices of default and notices of sale and plaintiff is informed and believes that unless action is taken by this court to preclude such sale that defendant will proceed with the same at its announced time of June 25, 1992, at 11:00 a.m. at the east entrance to the Siskiyou County Court House. In conjunction with that notice of sale, defendant has stated that the amount claimed under the deed of trust is currently the sum of $140,283.79.

9. The property sought to be taken by defendant by this sale includes plaintiff's home, which plaintiff values currently at approximately $500,000.00. Plaintiff has resided in the home for approximately 38 years and should she be required to remove from the premises by reason of the sale threatened by defendant, her business and other activities will be substantially disrupted such that it will be difficult or impossible to place a monetary damage amount thereon. In addition, it will also be necessary for plaintiff, in order to pursue any action to recover her home to bring suit against defendant as well as any other person who may have purchased an interest at the sale,

whether they have been advised of the allegations of this complaint.

By reason of the above allegations plaintiff has no adequate remedy at law for the injuries which will occur should the sale take place and she be forced from her home of many years.

Wherefore, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause if any it has why it should not be enjoined as hereinafter set forth during the pendency of this action.

2. For a temporary restraining order, a preliminary injunction and a permanent injunction, all enjoining defendant, it's agents, servants and employees and all persons acting thereunder, in concert with or for it from taking any action to enforce the note attached hereto as Exhibit "A" against plaintiff or to attempt to exercise any rights or powers set out in the deed of trust attached hereto as Exhibit "B".

3. For plaintiff's costs of suit herein.

4 For such other and further relief as the court deems proper.

Date: June 23, 1992

/s/ Robert A. Rehberg.
ROBERT A. REHBERG

EXHIBITS A - E
OMITTED INTENTIONALLY

VERIFICATION

I, JOANNE WESTON declare:

I am Plaintiff in the foregoing matter.

I have read the foregoing Complaint For TRO, Preliminary and Permanent Injunctions, Declaration and P & As. and know the contents thereof.

The same is true of my own knowledge except as to those matters which are therein stated on information and belief, and as to those matters, I believe to be true.

Executed on June 23, 1992, at Redding, Shasta County, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ JoAnne Weston
JOANNE WESTON